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IN THE UNITED STATES DISTRICT COURT **RECEIVED**
FOR THE DISTRICT OF NEW MEXICO

JAN 13 1999

**BEN EZRA, WEINSTEIN, AND
COMPANY, INC.**

PATRICK J. CAROME

Plaintiff,

vs.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

**MOTION TO AMEND COMPLAINT TO
JOIN ADDITIONAL DEFENDANTS**

COMES NOW the Plaintiff, **Ben Ezra, Weinstein and Company, Inc.** by and through its attorneys of record, **Aguilar Law Offices, P.C.** by Esteban A. Aguilar, **Moses, Dunn, Farmer & Tuthill, P.C.** by Mark A. Glenn, and **Pepper, Hamilton & Scheetz** by Paul Kennedy, and pursuant to Fed.R.Civ.P. 15 and 20 files its Motion for Leave to File an Amended Complaint to join additional Defendants, and as grounds therefor states as follows:

1. This is a business tort defamation case involving the publishing on the AOL Quotes and Portfolios Area of erroneous information pertaining to Plaintiffs' stock prices and trading volumes that occurred on March 4, 1997; August 6, 1997; and April 23, 1998. The gravamen of Plaintiff's Complaint is that the mistakes in reporting *inter alia* caused panic withdrawal of investors and selling of Plaintiff's stock, and severely damaged the present and future market value of Plaintiff's stock.

2. Additionally, this case raises significant important and first impression issues with potentially nationwide ramifications regarding the application and limits of the Communications Decency Act, particularly considering the emerging law regarding Internet access of information, Internet Communications, Internet publishing and the "World Wide Web."

3. On August 10, 1998, Defendant America Online, Inc. filed its Motion for Summary Judgment in this matter. In its Motion for Summary Judgment Defendant AOL, *inter alia*, argues that the Communication Decency Act, 47 U.S.C. § 230 provides blanket immunity from (a) causes of action of the type brought by the Plaintiff in this case, and (b) the burdens of litigation associated with such actions. In its Motion AOL generally argues it is not a "content provider" and therefore is absolutely immune from suit and from the burdens of litigation. In support of its Motion for Summary Judgment AOL filed, *inter alia*, the Affidavit of Michael Hsu filed on June 24, 1998, hereafter referred to as the "Hsu Affidavit."

4. In its Motion for Summary Judgment and its supporting Affidavits, including the Hsu Affidavit, AOL generally advances the argument that the errors in the reporting of Plaintiffs' price and volume were caused, not by AOL, but by **Townsend Analytics, Inc.**, and/or **S & P Comstock**.

5. It is Plaintiff's position, that AOL, in fact, is a content provider, and therefore, is liable to Plaintiff for damages caused by the erroneous and/or intentional or reckless reporting of the price of Plaintiff's stock and the

resultant panic withdrawal of investors, panic selling of Plaintiff's stock, and the damage to the present and future market value of Plaintiff's stock.

6. On August 10, 1998, in response to AOL's Motion for Summary Judgment, Plaintiff filed its response to the Motion, and also on August 20, 1998 filed a Rule 56 (f) Motion with supporting Affidavits seeking leave of the Court to conduct discovery to enable it to respond to the Motion for Summary Judgment filed by AOL.

7. On October 30, 1998, the Honorable Lorenzo Garcia, U.S. Magistrate, entered an order granting limited Rule 56 (f) discovery.

8. Following the entry of the discovery order, on or about November 17, 1998, Plaintiff's served its Rule 56 (f) interrogatories on AOL. Defendant AOL served its Answers to the Rule 56 (f) interrogatories on December 17, 1998. In its Answers to Plaintiff's Rule 56 (f) interrogatories, AOL more specifically stated that the errors in the reporting of Plaintiffs' price and volume were caused, not by AOL, but by **Townsend Analytics, Inc.**, and/or **S & P Comstock**. For example, in Answer to Interrogatory No. 8 that asked whether any of the S & P Comstock feeds are processed, altered, changed, formatted or reformatted by AOL prior to being placed on the AOL Quotes and Portfolio Area, AOL answered in part as follows:

AOL does not process, alter, change, format or reformat the ComStock Data Stream received from Comstock. As described in the Declaration of Michael C. Hsu, ¶¶ 8.C-E (filed on June 24, 1998) ("Hsu Declaration"), the ComStock Data Stream is processed and formatted by the Townsend Software running on the Townsend Computers. The ComStock Data Stream was not "placed on the AOL Quotes and Portfolios area."

9. Regardless and notwithstanding the foregoing answer, it continues to be Plaintiff's position that AOL is a "content provider" as that term is defined by the Communication Decency Act, and that AOL's Answers to Plaintiff's Rule 56 (f) interrogatories raise a genuine and material issue of fact sufficient to defeat summary judgment based on the immunity purportedly granted AOL by the Communications Decency Act. For instance, in answer to Interrogatory Nos. 3 and 4 that asked AOL to identify individuals whose job duties or responsibilities, *inter alia*, included correcting errors or communicating **with S & P Comstock** or **Townsend** about the errors in reporting of Plaintiff's stock prices and volume, AOL answered in part as follows:

Any errors in the information concerning BEW's stock that was available through AOL's service were corrected (if at all) by Comstock and/or Townsend or other persons or entities with access to information concerning trading of BEW's stock at the times in question. The only type of action by an AOL employee that arguably might be characterized as having "correct[ed]" any such error was the installation by Mr. Berg¹ of revised versions of the Townsend Software on the Townsend Computers.

In addition, in answer to Interrogatory No. 6 that sought information pertaining to the communication with the Townsend Computers for purposes of formatting, or coding information for publication in the AOL Quotes and Portfolios area, AOL answered in part as follows:

AOL software running on such computer systems did perform limited formatting of the information retrieved from the Comstock/Townsend Database. This AOL software did not alter the values for the price or volume information retrieved from the Comstock/Townsend Database.

¹ Mr. Joseph E. Berg, a Systems Integrator, previously was identified as a AOL employee.

10. In addition, AOL, in its Answers to Plaintiff's Rule 56(f) interrogatories, for the first time disclosed the names of the individuals at S & P Comstock and Townsend Analytics, Inc. that it had dealt with in connection with errors in reporting of Plaintiff's stock. In an attempt to verify the information provided by AOL, counsel for Plaintiff made attempts to interview the people with knowledge about this matter at both McGraw-Hill, which owns S & P Comstock, Inc., and at Townsend Analytics, Inc. In both instances, Plaintiff's counsel was referred to corporate counsel and generally was given the impression that unless they were joined as parties in this action, neither **S & P Comstock** or **Townsend Analytics, Inc.** would voluntarily cooperate, particularly during the limited period of time that Plaintiff has to respond to the pending Motion for Summary Judgment. In support of this Motion, Plaintiff attaches the Affidavit of Esteban A. Aguilar regarding the above-referenced phone calls, as **Exhibit "A."**

11. In fact, and without conceding the liability of Defendant AOL, Plaintiff now believes that **Townsend** and/or **Comstock** may also be liable to Plaintiff for the errors in reporting of Plaintiff's stock information that is at issue in this case. Alternatively, **AOL**, **Townsend** and/or **Comstock** all may be jointly or severally liable to Plaintiff.

12. Pursuant to Fed.R.Civ.P. 15 and 20 Plaintiff seeks leave of the court join both **Townsend Analytics, Inc.**, hereafter referred to as "**Townsend**," and **McGraw Hill (S & P Comstock)**, hereafter referred to as "**Comstock**" as party Defendants in this case because these defendants are indispensable parties

and justice requires their joinder for a fair, full and complete adjudication of Plaintiff's claims. A copy of the proposed Second Amended Complaint is attached hereto as **Exhibit "B"**.

13. Counsel for AOL has been contacted and opposes the granting of this Motion.

14. In support of this Motion, Plaintiff submits its supporting memorandum.

Respectfully Submitted,

COUNSEL FOR PLAINTIFF:

AGUILAR LAW OFFICES, P.C.
1011 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 242-6677

Original signed by
ESTEBAN A. AGUILAR

By: _____
Esteban A. Aguilar

Mark Glenn, Esq.
**MOSES, DUNN, FARMER & TUTHILL,
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Paul J. Kennedy, Esq.
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(215) 981-4000

I hereby certify that a true and correct copy of the foregoing pleading was mailed on this the 12th day of January, 1999 to the following counsel of record:

COUNSEL FOR DEFENDANTS:

Mr. John Baugh, Esq.
Eaves, Bardacke & Baugh, P.A.
P. O. Box 35670
Albuquerque, NM 87176-5670

Mr. Patrick J. Carome, Esq.
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, D.C. 20037

Original signed by
ESTEBAN A. AGUILAR

Esteban A. Aguilar

& P Comstock: Daniel Connell, Mike Corcione, Paul Cregan, Peter Iovanella, George Katsch, Joe Lemmons, Tony Padovano, Rich Wilkins, David Young, and Paul Zinone.

6. After consultation with my client, on December 22, 1998, I called Townsend Analytics, Inc. (hereafter "Townsend") and spoke with Mary Ann Cook. I advised her who I was representing, about the pendency of this lawsuit, about the answers to interrogatories filed by AOL and that I was trying to interview the individuals employed by Townsend for purposes of determining whether there was any problem with the Townsend software. She referred me to Stuart Townsend, the President of Townsend. On December 22, 1998, I left a detailed message on Stuart Townsend's voice mail asking him to call me.
7. On December 23, 1998, at approximately 9:32 a.m., I again called Stuart Townsend's office. Again, I left a message. At approximately, 10:20 a.m. Mr. Townsend returned by call. He advised that he knew why I was calling, but advised that he could not discuss it with me because they were doing "all of this" for their client McGraw-Hill, who owns Comstock. He referred me to Dan Connell, President of Comstock. Thereafter, I called Mr. Connell. He was not in, and I left a message.
8. Following Christmas weekend, on December 28, 1998, I again called Mr. Connell. He knew who I was and why I was calling. He had heard about the lawsuit, but did not want to talk about it. He referred me to Kathryn Roome, one of the attorneys at the McGraw-Hill Legal Department in New York. I called Kathryn Roome. She was not in and I spoke with her secretary/assistant Leslie. She advised that Kathryn was out all week. She said she would have the General Counsel, Mr. Ken Vitters, call me.
9. At approximately 2:31 p.m. on December 28, 1998, I spoke with Mr. William Farley, another attorney at the Legal Department at McGraw-Hill. I advised of my involvement and why I was calling. I also advised about the nature of the lawsuit and the general nature of the defenses raised by AOL. He advised he was reluctant to talk to me. He told me he would talk with Kathryn when she got back the week after New Years. He said he was uncomfortable with the choices I was giving him. Either they allow me to interview witnesses that could implicate Comstock or we use that information to defeat AOL's Motion for Summary Judgment. I told him I just wanted the

facts. He thanked me for my candor and told me he would have Kathryn Roome call me the week after New Years weekend.

FURTHER, AFFIANT SAYETH NOT.

Original signed by
ESTEBAN A. AGUILAR

Esteban A. Aguilar

SUBSCRIBED AND SWORN TO before me by Esteban A. Aguilar on this 12th day of January, 1999.

Notary Public

My Commission Expires:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**BEN EZRA, WEINSTEIN AND
COMPANY, INC.**

Plaintiff,

v.

NO. CIV 97-0485 LH/LFG

**AMERICA ONLINE, INC., STANDARD
& POORS COMSTOCK, INC., THE
MCGRAW HILL COMPANIES, and
TOWNSEND ANALYTICS, LTD.**

Defendants.

**SECOND AMENDED COMPLAINT FOR DEFAMATION,
NEGLIGENCE AND INJUNCTIVE RELIEF**

Plaintiff **Ben Ezra, Weinstein and Company, Inc.**, hereafter "**BEW**," by and through its counsel of record, **Aguilar Law Offices, P. C.** by Esteban A. Aguilar and **Moses, Dunn, Farmer & Tuthill, P.C.**, by Mark A. Glenn, and **Pepper, Hamilton & Scheetz**, by Paul Kennedy, for its Second Amended Complaint for Negligence, Defamation and Injunctive Relief, states:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, **BEW** is a New Mexico corporation with its principal place of business at 6301 Indian School Road NE, Suite 950, Albuquerque, New Mexico. At all times pertinent hereto, Plaintiff, or its employees, were subscribers to the AOL services described in this complaint.

A. **BEW** is a designer and manufacturer of corporate finance computer software that provides interactive applications to help financial

professionals, businesses and individuals comprehend financial information and makes it possible for users to prepare filings required under the Securities laws.

B. **BEW** is a publicly traded corporation whose stock is currently designated as "Over-the-Counter" ("OTC") stock.

C. **BEW** stock is not listed or traded on the New York Stock Exchange (NYSE), the American Stock Exchange (ASE), the NASDAQ National Market System, or the NASDAQ Small Cap System.

D. **BEW** listed its stock for trade on the OTC market on December 27, 1996, and **AOL** began publishing quotations on **BEW** stock prices and volume thereafter.

2. Defendant, **America Online Inc.**, hereafter "**AOL**", is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 8619 Westwood Center Drive, Vienna, Virginia.

A. **AOL** is qualified to do business in the State of New Mexico, and regularly transacts business in the State.

B. **AOL** is an international computer on-line and Internet access service provider.

C. **AOL** is the largest interactive computer service in the world. It has more than 12 million subscribers that connect to AOL via computer modems.

D. **AOL's** service is available to the general public, including citizens and businesses within the State of New Mexico, by subscription, which allows subscribers to connect their home and business computers to **AOL's** on-

line and Internet service by way of a modem device utilizing normal telephone lines. Subscribers utilize **AOL**'s services to receive up-to-date news, information sources, programs, and to connect to the Internet and World Wide Web ("www") via **AOL**'s access service.

E. As part of its subscription services, **AOL** provides up-to-the-minute business and financial information and portfolio services to its subscribers, including stock prices and volume of shares of stock traded, through its "Quotes and Portfolios" area. As with other **AOL** services, the information in the "Quotes and Portfolios" is constantly changing and constantly updated.

3. Defendant **Standard and Poors ComStock, Inc.**, hereafter referred to as "**ComStock**," is a corporation and division of Defendant **The McGraw Hill Companies**. It has its principal places of business at 600 Mamaroneck Avenue, Harrison, NY 10528, and at 2 Prudential Plaza, 7th floor, Chicago, IL 60601. At all times relevant hereto, **ComStock** transacted business within the State of New Mexico, as more particularly described below.

A. **ComStock** is a provider of financial information to people and businesses all over the world. It provides financial data from more than 125 sources and exchanges worldwide, including OTC stock information, equities, options, futures, fixed income, foreign exchange, analysis and news.

B. **ComStock** also provides financial data to more than 150 online financial information providers, including **AOL**, Prodigy, Microsoft Investor, and CNN Financial News. The stock quote information provided by

ComStock includes detailed data for more than 20,000 publicly traded stocks and securities, including the market price for specific stocks, volume of stocks traded in the current or previous trading day.

C. **ComStock** gets this information from the major national and international stock exchanges and stock markets, including NYSE, ASE, NASDAQ and OTC markets. **ComStock** continuously and constantly updates this information.

4. Defendant **The McGraw Hill Companies** is a corporation having its principal place of business in _____. Upon information and belief, it is the parent company of **ComStock**, and directs or otherwise exercises control over the activities engaged in herein by **ComStock**. All of the allegations contained herein against **ComStock**, also are alleged against **The McGraw Hill Companies** to the extent such activities or conduct is directed or otherwise controlled by **The McGraw Hill Companies**, or alternatively, if any of the acts of commission or omission alleged herein were the acts of **The McGraw Hill Companies**.

5. Defendant **Townsend Analytics, Ltd.**, hereafter "**Townsend**," is a corporation with its principal place of business located at 100 S. Wacker, Suite 2040, Chicago, IL 60606. Upon information and belief, at all times pertinent hereto **Townsend Analytics, Ltd.**, had a contractual or other relationship with **ComStock** and was acting as the agent of **ComStock**, all as more particularly alleged and described herein, or alternatively, was acting on its own behalf.

6. At all times relevant hereto, **AOL**, **ComStock** and **Townsend**

transacted business within the State of New Mexico as more particularly alleged in the **Allegations Common to All Counts**. At all times pertinent hereto, as alleged herein, the Defendants, and each of them, engaged in and conducted business in New Mexico via the Internet and the World Wide Web. The Defendants, and each of them, published information that was available to subscribers of AOL, including citizens in the State of New Mexico. This action arises out of the interstate commerce activity conducted by the Defendants on the Internet and the World Wide Web.

7. The Court has jurisdiction over the parties and subject matter of this action, and venue is proper.

ALLEGATIONS COMMON TO ALL COUNTS

8. Information regarding OTC stocks is sent by **ComStock** to **AOL** via various communications and computer links. This information shall hereafter be referred to as the "**ComStock Data Stream**." The **Comstock Data Stream** is the continuous electronic stream of encoded data transmitted to **AOL** by **ComStock** that purported to reflect, among other things, information about each purchase and sale of the securities tracked by ComStock. The ComStock Data Stream is received on AOL's premises in Virginia by machines that, upon information and belief, are owned by **ComStock**, hereafter "ComStock Computers." Upon information and belief, the sole purpose of the ComStock computers, and the software contained therein, is the delay of the availability of the information contained in the ComStock Data Stream for fifteen to twenty (15-20) minutes.

9. **AOL** and/or **Comstock** then transmits, forwards or otherwise sends the Comstock Data Stream and the information contained therein, including information pertaining to OTC stocks, to the **AOL** computer system. While the full extend of the **AOL** computer system is not known at this time, at a minimum, the **AOL** computer system includes, upon information and belief, a set of interconnected personal computers that are owned or leased by **AOL** that are dedicated to handling, indexing, tabulating, and holding the data contained within the ComStock Data Stream. These computers hereafter shall be referred to as the "AOL/Townsend Computers."

10. The AOL/Townsend Computers run software that was installed on the AOL/Townsend Computers by employees, agents or contractors of Comstock. This software hereafter is referred to as the "Townsend Software." It was placed on the AOL/Townsend computers pursuant to an agreement, license or other arrangement by **AOL** and **ComStock** and/or **Townsend**.

11. Upon information and belief, the Townsend Software that is run by the AOL/Townsend Computers was developed, created, marketed, sold, licensed or leased to **AOL** for use on the AOL/Townsend Computers by **Townsend** and/or **ComStock**.

12. The AOL/Townsend Computers, using the Townsend Software, collect, decode, index, tabulate and format the data contained in the ComStock Data Stream into an electronic table or database that contained price, volume and other information organized on a security--by--security basis. This table or database shall hereafter be referred to as the "Comstock/Townsend Database."

The ComStock/Townsend Database is maintained, stored and kept on the AOL/Townsend Computers.

13. Thereafter, **AOL** reformats, changes or alters the Comstock/Townsend Database information for purposes of posting, displaying, publishing or otherwise making the stock information available on the **AOL** Quotes and Portfolios area.

14. **AOL** subscribers can access any of the stock information by accessing the **AOL** service, going to the Personal Finance Channel, and accessing the **AOL** Quotes and Portfolios area.

15. The **AOL** Quotes and Portfolios area is only accessible to **AOL** subscribers.

16. At all times pertinent hereto, BEW stock information, including price and volume, was transmitted as part of the ComStock Data Stream, to the AOL/Townsend Computers at **AOL** facilities. **BEW** stock information, including price and volume, was accessible through the **AOL** Quotes and Portfolios area to **AOL** subscribers.

17. **BEW** relies on **AOL** for publication of its stock price and volume of shares traded because such information is critical to current and potential investors in **BEW** stock when making investment decisions. The information published by **AOL** also is extremely important to **BEW**'s current and potential lenders and business partners in determining the financial strength and overall business condition of **BEW**.

PRIOR KNOWLEDGE OF PROBLEMS

18. On or about the middle part of February 1997, **AOL** began publishing inaccurate quotations on certain OTC stocks, which were being listed ten times lower than the actual stock value.

19. Upon information and belief, this information originated from **ComStock** and was incorrect when it was transmitted to **AOL** subscribers through the **AOL** Quotes and Portfolios area.

20. Upon information and belief, none of the other dozens of online services to which **ComStock** supplies financial information for re-distribution published the same inaccurate information as **AOL** regarding those OTC stocks.

21. Although fully aware of the inaccurate quotation problem on certain OTC stocks, **AOL** did not advise plaintiff or the public of the problem, nor did **AOL** act promptly to correct the problem.

MARCH 4, 1997 INCIDENT

22. On or about the evening of March 4, 1997, as a result of numerous phone calls from investors and media, **BEW** discovered that **AOL** was publishing incorrect information as to **BEW**'s stock price and volume of shares traded.

23. On March 4, 1997, **AOL** erroneously reported the plaintiff's stock as closing at \$.17 per share on a volume of 1.3 million when the actual last trade was \$1.84 per share on a volume of 30,500 shares.

24. **BEW** immediately contacted **AOL** on the morning of March 5, 1997, to report the problem and the serious consequences such misinformation was having on its plunging stock value, and requested immediate and emergency attention. Specifically, **BEW** asked **AOL** to immediately correct the erroneous

stock information, and pending publication of the correction, either to stop publishing the erroneous information, or to provide a prominent notice to **AOL's** subscribers who sought to access the OTC stock information alerting them that the information on **BEW's** and other OTC stocks was incorrect.

25. After taking several hours to respond, Jim Hoscheit, an **AOL** employee acting within the course and scope of his employment, hereafter referred to as ("Hoscheit") told **BEW** that **AOL** previously knew of the problem and had been aware of the software problem for "a few weeks." Hoscheit said the problem was a "decimal truncation error" that affected only OTC stocks, including **BEW's** stock, and that it had not corrected it. Hoscheit advised **BEW** about this by calling Mr. Michael L. Weinstein, **BEW's** Chief Operating Officer, at his home and leaving a message on his home answering machine. A copy of the transcript of the recording is attached hereto as Exhibit "1."

26. **AOL** represented to **BEW** that it would not be able to stop publishing the wrong information regarding **BEW** for at least a couple of days. **AOL** promised that it would immediately publish a prominent online notice, or a "splash page," alerting subscribers to the erroneous information.

27. Meanwhile, on March 5, 1997, as a direct result of the erroneous stock price and volume published by **AOL**, **BEW's** stock had the most active trading day in its history. The panic caused by the stock having apparently precipitously dropped to one-tenth of its value on volume inflated by a factor of 100, caused a sell-off that drove down the actual price of **BEW's** stock, at one point during that trading day, to approximately 47% (on the bid price) of its

value of the March 5, 1997 close.

28. Upon information and belief, none of the other dozens of online services to which **ComStock** supplies financial information for re-distribution published the same inaccurate information as **AOL** regarding **BEW** stock prices on March 4, 1997.

29. **BEW** filed a lawsuit in New Mexico State District Court on March 11, 1997, against **AOL**.

AUGUST 6, 1997 INCIDENT

30. On August 6, 1997, **AOL** again incorrectly reported the price of **BEW**'s stock, along with inaccurate numbers of shares traded. **BEW**'s local counsel telephoned **AOL**'s national counsel to complain about the mistakes by **AOL**, and the incorrect information was corrected by **AOL**.

31. In addition, **AOL** then posted the following statement after it corrected the inaccurate stock information:

"Due to technical problems, some price and volume information available through our quote service for BNEZ (BEN EZRA WEINSTEIN & CO) was inaccurate for a brief period of time this morning. We apologize for any inconvenience this may have caused."

32. Upon information and belief, none of the other dozens of online services to which **ComStock** supplies financial information for re-distribution published the same inaccurate information as **AOL** regarding **BEW** stock prices on August 6, 1997.

APRIL 23, 1998 INCIDENT

33. On April 22, 1998, **BEW** issued a press release that announced it had received final regulatory approval to complete the acquisition of a legal

software development company. The press release, which was published on the Internet, also indicated that the two principals of **BEW**, Chief Executive Officer Jack Ben Ezra and Chief Operating Officer Michael Weinstein, announced that they were purchasing common shares of **BEW** on the open market.

34. The following day, April 23, 1998, **AOL** again listed an incorrect price for **BEW** stock. **AOL** indicated that **BEW** stock had fallen to seven cents per share when the stock actually was trading at 19 cents a share. This incorrect **AOL** report caused the price of **BEW** stock to fall again.

35. Again, local counsel for **BEW** notified national counsel for **AOL** that it was reporting the stock price incorrectly. **AOL** corrected the problem so that the price of **BEW**'s stock was being accurately reported by **AOL** as of the close of the trading day on April 23, 1998. As of the afternoon of April 30, 1998, **BEW** stock was trading at 14.5 cents per share.

36. Upon information and belief, none of the other dozens of online services to which **ComStock** supplies financial information for re-distribution published the same inaccurate information as **AOL** regarding **BEW** stock on April 23, 1998.

37. Upon information and belief, major financial transactions with **BEW** were lost and/or terminated by potential lenders because of the erratic trading of **BEW**'s stock due to the incorrect information repeatedly provided by **AOL**.

38. **BEW**'s financial strength and business reputation also has suffered a tremendous blow by **AOL**'s repeated publication of erroneous information regarding **BEW**'s stock.

COUNT I

DEFAMATION

39. **BEW** realleges and reincorporates the allegations contained in Paragraphs 1 through 38 of this Second Amended Complaint as if fully set forth herein.

40. **AOL, Townsend and ComStock**, by knowingly, intentionally and repeatedly publishing incorrect information concerning **BEW's** stock, has wrongfully injured **BEW's** reputation in the financial and business community.

41. False and defamatory information regarding **BEW's** stock was repeatedly published by **AOL, Townsend and ComStock**.

42. **AOL** subscribers who received the communications concerning **BEW's** stock understood the information to be defamatory.

43. **AOL**, as evidenced by the statement of its employee, agent or representative, Hoscheit, knew that the information on **BEW** stock was false or negligently failed to recognize that it was false.

44. The repeated publication of false and defamatory information concerning **BEW's** stock proximately caused actual injury to **BEW's** reputation.

45. **AOL, ComStock and Townsend's** acts of omission or commission were willful, wanton, reckless or grossly negligent, and **BEW** is entitled to recover punitive damages in an amount sufficient to punish the Defendants and deter similar wrongful conduct in the future.

WHEREFORE, Plaintiff **Ben Ezra, Weinstein and Company, Inc.** respectfully prays for judgment against Defendants, jointly and severally, as

follows:

- A. For its actual economic damages in an amount to be proved at trial;
- B. For loss of business opportunity and investments in an amount to be proved at trial;
- C. For damages to its business reputation in an amount to be proved at trial;
- D. For lost profits and loss of prospective business advantage in an amount to be proved at trial;
- E. For punitive damages in an amount to be proved at trial;
- F. For pre-judgment and post-judgment interest as allowed by law;
- G. For its costs of court;
- H. For such other and further relief as the Court deems just and proper.

COUNT II

NEGLIGENCE

46. **BEW** realleges and incorporates the allegations contained in Paragraphs 1 through 38 of this Second Amended Complaint as if fully set forth herein.

47. **AOL** had, and continues to have, a duty to its subscribers and to **BEW** to report **BEW**'s stock information accurately.

48. **ComStock** and **Townsend** had, and continue to have, a duty to AOL subscribers to report **BEW**'s stock information accurately.

49. **AOL**, **ComStock**, and **Townsend**, failed to exercise reasonable care in the transmission of certain OTC stock data, including **BEW**'s, resulting in the

dissemination of incorrect factual information regarding the price and volume of **BEW** stock.

50. Despite knowing that incorrect information was being published about **BEW** stock, **AOL**, **ComStock**, and **Townsend** failed to take reasonable steps in a timely manner to correct the false information or warn its subscribers that the information was false.

51. As the direct and proximate result of **AOL**'s breach of duty, **BEW** has suffered economic injuries and damages and special damages in an amount to be proved at trial.

52. **AOL**, **ComStock** and **Townsend's** acts of omission or commission were willful, wanton, reckless or grossly negligent, and **BEW** is entitled to recover punitive damages in an amount sufficient to punish the Defendants and deter similar wrongful conduct in the future.

WHEREFORE, Plaintiff **Ben Ezra, Weinstein and Company, Inc.** respectfully prays for judgment against Defendants, jointly and severally, as follows:

- A. For its actual economic damages in an amount to be proved at trial;
- B. For loss of business opportunity and investments in an amount to be proved at trial;
- C. For damages to its business reputation in an amount to be proved at trial;
- D. For lost profits and loss of prospective business advantage in an amount to be proved at trial;

- E. For punitive damages in an amount to be proved at trial;
- F. For pre-judgment and post-judgment interest as allowed by law;
- G. For its costs of court;
- H. For such other and further relief as the Court deems just and proper.

COUNT III

INJUNCTIVE RELIEF

53. **BEW** realleges and reincorporates the allegations contained in Paragraphs 1 through 48 of this Second Amended Complaint as if fully set forth herein.

54. **AOL, ComStock** and **Townsend** have demonstrated repeatedly that they have published incorrect information regarding **BEW's** stock to **AOL's** millions of subscribers.

55. Unless enjoined by this Court, upon final hearing, **AOL, ComStock** and **Townsend** will continue to publish incorrect information regarding **BEW's** stock to the millions of **AOL** subscribers.

56. Absent a permanent injunction, upon final hearing, **BEW** will continue to suffer irreparable harm and damage.

WHEREFORE, Plaintiff **Ben Ezra, Weinstein and Company, Inc.** respectfully requests as follows:

- A. For a permanent injunction against Defendants, and each of them, prohibiting them from publishing erroneous stock information pertaining to **BEW**;
- B. For costs of court

C. For such other and further relief to which plaintiff may be justly entitled.

Respectfully Submitted,

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I hereby certify that a true and correct copy of the foregoing pleading was mailed on this the 12th day of January, 1999 to the following counsel of record:

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